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No. 03-935

Supreme Court, U.S.
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# In The Supreme Court of the United States

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA,

*Petitioners,*

v.

LT. COL. K.F. UBBELOHDE, DIST. ENGINEER, OMAHA DIST., U.S. ARMY CORPS OF ENGINEERS; GEN. D.A. FASTABEND, COMMANDER, NW DIV., PORTLAND, OR., U.S. ARMY CORPS OF ENGINEERS; STATE OF MISSOURI; AND THE STATE OF NEBRASKA; ET AL.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

The States of Missouri and Nebraska, the MO-ARK Association, and the U.S. Corps of Engineers oppose the Petition on numerous grounds. Before responding, the Dakotas restate the issue on which review is sought. To the great detriment of the Dakotas, the Eighth Circuit misinterpreted the 1944 Flood Control Act. Pub. L. No. 78-534, 58 Stat. 887 (1944). The court of appeals stated that while the Act requires that the Missouri River is to be managed for several purposes, two of these purposes, flood control and navigation, have preeminence. Pet. App. at 5, 21, 32. The Dakotas agree that flood control is the Act's primary purpose, but disagree that navigation takes precedence over other uses. More particularly, the court erred in concluding that the Act gives navigation priority over recreation. This error of law requires review.

### I. The Question Presented accurately reflects the ruling by the court of appeals.

**a. The Corps' argument.** The Corps states that the Petition is flawed because North and South Dakota misunderstand the court's ruling. Corps Brf. at 13-15. In the Corps' view, the court did not construe the 1944 Flood Control Act to give navigation a priority. On the contrary, the Corps states, the court ruled that project purposes have parity. *Id.* at 17. Such a fundamental disagreement about the court's ruling makes it necessary to quote the court's statements about the Act.

> The Act . . . laid out certain substantive interests that it was to serve. The *dominant functions* of the Flood Control Act were to avoid flooding and to maintain downstream navigation. . . . At the same time, however, the Act recognizes *secondary uses* of the River including irrigation, recreation, fish, and wildlife.

Pet. App. at 5 (emphasis added; citations omitted). The court states that, under the Act, navigation is a "dominant

function" and recreation is a "secondary use." This is an expression of priorities, and even if it is implied it is nonetheless clear. Consequently, the Corps' argument that the "decision does not establish priorities" is at best strained. Corps Brf. at 13. The court of appeals also stated:

> The Flood Control Act clearly gives a good deal of discretion to the Corps in the management of the River. But this discretion is not unconstrained; the Act lays out purposes that the Corps is to consider in managing the River. The Act recognizes what the Supreme Court has called the *dominant functions* of the River's reservoir system – flood control and navigation . . . While flood control and navigation are *dominant functions*, the Act also recognizes recreation and other interests [as] *secondary uses* that should be provided for. . . . The text of the . . . Act thus sets up a balance between flood control, navigation, recreation, and other interests.

Pet. App. at 21 (emphasis added; citations omitted). The court again labeled navigation "dominant" and recreation "secondary." While the court added that the Act requires the Corps to "balance" all interests, this is small comfort when some interests are "dominant" and others "secondary." The resulting "balance" will, as it has in the past, favor navigation. The court's third statement about the Act settles any doubt about its ruling.

> North Dakota argues that the Flood Control Act itself precludes the Corps from favoring navigation over recreation. This argument is simply incorrect; the . . . *Act does not require the Corps to give equal treatment to recreation.* The . . . Act provides little guidance about what priority the Corps can or must give to different interests. The evidence that we do have, including the sequential listing of interests that uniformly lists navigation before recreation, indicates that the Corps's *primary concerns* should be flood control and navigation.

Pet. App. at 32 (emphasis added). The court here expressly rejects the idea that the Act gives parity to recreation and navigation. It found such an idea "simply incorrect."

The Corps is alone in its curious view of the decision. Nebraska, for example, believes that the court did give navigation a priority. According to Nebraska, the court "rejected the Dakotas' basic premise, that the [Act] requires the Corps to 'equitably balance the uses to which the river is put.'" Neb. Brf. at 17. *See also* MO-ARK Brf. at 13; Mont. Amicus Brf. at 2-3. Similarly, the Nebraska District Court believes that the Eighth Circuit decision gives navigation a priority.

> The Eighth Circuit . . . stated that one of the Corps' primary interests is maintaining navigation flows . . . and . . . acknowledged that the maintenance of minimal navigable flows trumps other important interests, including the protection of wildlife.

Mem. & Ord. on Motion to Amend Preliminary Injunction at 2, *Nebraska v. Ubbelohde*, No 8:02CV217 (D. Neb. July 23, 2003).

The Corps' position actually supports certiorari. The Corps is responsible for implementing the 1944 Act and has a substantial interest in its proper interpretation. The court of appeals ruled that the Act gives navigation a priority. The Corps believes that such an interpretation is wrong. *E.g.,* Corps Brf. at 17. *See also* Pet. at 21-24. Thus, the Corps *agrees* with the Dakotas that the Act does not give navigation a priority. If the Corps properly understood the court's ruling it would seem compelled to support the Petition to ensure that its governing statute is properly construed.

**b. The MO-ARK and Nebraska arguments.** MO-ARK and Nebraska state that the Question Presented was not addressed by the court of appeals. MO-ARK Brf. at 7-8, 10-11; Neb. Brf. at 15-17. The Question Presented concerns whether the Act favors navigation over recreation. Pet. at 6-9. The court explicitly addressed this issue,

Pet. App. at 5, 21, 32, and its ruling on navigation's priority was not dicta. The court's understanding of the Act led directly to overturning the North Dakota and South Dakota injunctions. As such, the Petition does not, in Nebraska's words, "improperly aggrandize the issue decided." Neb. Brf. at 15. Nor does the Petition "dramatically misstate the issue presented and ruled on below." *Id.* at 1. In further response to Nebraska's argument that the Question Presented was not addressed by the court, the Dakotas quote from a motion Nebraska filed with the Eighth Circuit:

> The interpretation of the Flood Control Act of 1944 is also before this Court. It was squarely raised by the Corps in the appellant's brief filed in . . . Cause No. 02-2191, and also raised by the Corps in its appellees' briefs in . . . Cause Nos. 02-2187 and 02-2305. It has been briefed by all of the party States, including North Dakota, South Dakota, Nebraska, and Missouri, as part of these consolidated appeals.

Nebraska's Motion to Enlarge Appellate Stay at 15, *Nebraska v. Ubbelohde*, No. 02-2191 (8th Cir. May 23, 2003).

Nebraska also describes the court of appeals decision as a "straightforward" agency review case unworthy of certiorari. Neb. Brf. at 16. *See also* MO-ARK Brf. at 7. Because the underlying actions raise an APA claim hardly warrants rejecting certiorari. It is not uncommon for the Court to review APA cases. *E.g.*, *Alaska Dep't of Envt'l Conservation v. E.P.A.*, 124 S.Ct. 983 (2004); *Dickinson v. Zurko*, 527 U.S. 150 (1999).

Nebraska and MO-ARK point out that the court of appeals, besides ruling on the 1944 Act, also ruled that the Corps' decisions are subject to judicial review and that South Dakota's judicial estoppel theory lacked merit. Neb. Brf. at 15; MO-ARK Brf. at 7-8. The Dakotas do not seek review of the court's ruling on these issues, which are irrelevant in deciding whether the court's interpretation of the Act merits review.

## II. The Question Presented is not an interlocutory matter better decided another day.

The Corps argues that North Dakota's suit and South Dakota's suit, which were brought in 2002 to protect the 2002 smelt spawn, are yet to be decided on their merits and that when they are, the states should then seek to place their concerns about the Flood Control Act before this Court. Corps Brf. at 16. This argument is inconsistent with the Corps' current litigation position in the underlying actions, which it seeks to dismiss on jurisdictional grounds. In a pending motion before the District Court, the Corps asserts that the suits no longer present a case or controversy. Federal Defendants' Motion for Summary Judgment on Existing Factual Circumstances, *In re Operation of the Missouri River System Litigation,* No. 03-MD-1555 (D. Minn. Dec. 15, 2003).

> Many of the claims currently before this [District] Court are now moot because they challenge agency actions that have now expired and are wholly in the past. . . . Similarly, several Plaintiffs have challenged elements of the Corps' Missouri River operations for 2002 . . . The challenged elements of the Corps' operations, however, are now over.
>
> Even if Plaintiffs satisfied the requirements of standing when these challenges were filed . . . they cannot do so any longer. These past agency actions cannot injure Plaintiffs now. Because Plaintiffs cannot show the 'requisite personal interest' to maintain these claims, the claims are now moot and the Court has been deprived of jurisdiction over them.

*Id.* at 9.

If the Corps has its way, there will not be a decision on the merits. There will not be any further discussion by any court of the Flood Control Act's proper meaning. The Question Presented will either be considered by this Court now or, if the Corps has its way, not at all. Further, in light

of the Eighth Circuit's decision, North and South Dakota believe that their 2002 suits, which challenged the Corps' decision to prefer navigation to recreation, have little life left if this Court denies review. No further proceedings are needed to make the Question Presented ripe for review by this Court.

## III. The Question Presented does not ask that the Court resolve fact questions, interfere with an on-going administrative process, or second-guess Congressional policy.

MO-ARK asserts that if the Court issues a writ it will have to address factual disputes. MO-ARK Brf. at 9. This is not so. It is the court of appeals' misreading of the 1944 Flood Control Act that warrants review. This is a question of law.

MO-ARK and the Corps argue that since the Corps is revising its 1979 Master Manual the Court should not become involved because a new Manual may resolve the dispute. Corps Brf. at 17; MO-ARK Brf. at 11. A new Master Manual is to be issued March 19, 2004. Corps Brf. at 12-13. It is likely to be challenged by numerous parties and when it will take effect is uncertain. More importantly, the Question Presented does not ask the Court to review either the Manual or what the court of appeals said about it. Rather, the issue that merits certiorari, the sole issue on which the Dakotas seek review, is the proper interpretation of the governing document, the 1944 Act.

The Corps also states that one of our "basic claims" is that the Manual unfairly considers recreation interests. Corps Brf. at 17. This is misleading. The Question Presented has nothing to do with the Manual. The Petition is confined to the Flood Control Act. Consequently, whatever the Corps may do about revising the Manual is irrelevant to deciding whether certiorari is warranted.

Nebraska argues that the Act is clear and that the Dakotas want it re-written. Neb. Brf. at 25-26. *See also*

Miss. Brf. at 9-10. The Act approved the Pick Plan and the Sloan Plan "as revised and coordinated" by the Joint Report. Pet. App. at 90. The Joint Report states that the basin is to be developed to "secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." *Id.* at 102. There is no list of priorities here. Congress expressly included recreation and wildlife as purposes for which the river is to be managed and did not assign these interests a priority lower than navigation. The Dakotas are not asking the Court to re-write the Act, but seek its proper interpretation.

## IV. The Question Presented seeks resolution only of the disparate treatment given recreation and navigation. It does not implicate other downstream uses and does not seek day-to-day judicial oversight of the Corps' operations.

Nebraska and MO-ARK discuss such downstream interests as flood control and water needs for irrigation, drinking water, and power plants. MO-ARK Brf. at 3-4; Neb. Brf. at 4-7. This obscures the issue. Firstly, the Petition does not question operating the system for flood control. Flood control has priority. Secondly, the only relationship the court of appeals ruled on was the one between recreation and navigation. The relationship between recreation and other downstream interests wasn't considered. The Petition seeks review solely of the court's holding that the Flood Control Act prefers navigation to recreation. Further, any implication that the flows needed for navigation are the flows needed for other downstream interests is untrue and unsupported. MO-ARK Brf. at 3-4, 17; Neb. Brf. at 5-6. The upstream-downstream dispute arises because of the extravagant water demands made by downstream shipping. Navigation is a water hog. The level of flows needed to support the barge industry exceeds those needed for power generation, irrigation, and drinking water. These uses can be protected with far less water

than the barges require. For example, the Corps' 2001-2002 Annual Operating Plan states that Gavins Point releases to support navigation generally need to be around 25,000 cfs. Consol. App. at 1575, 1578, *South Dakota v. Ubbelohde*, Nos. 02-2187, 2191, 2305 (8th Cir.). The Plan also notes that 14,000 cfs is generally "adequate to serve all downstream water intakes." *Id.* at 1578. *See also id.* at 1579. The 1979 Master Manual also expresses the disparities in streamflow requirements between navigation and other downstream interests. *E.g.*, *id.* at 1396-1401. MO-ARK and Nebraska unfairly seek to couple the moribund navigation industry to more practical and justifiable uses.

Further, neither North Dakota nor South Dakota seek a preference for recreation over such downstream uses as drinking water and power generation. Nebraska mischaracterizes our position when it states that "the Petition is about maximizing the Dakotas' interests at the expense of established downstream uses . . . " Neb. Brf. at 26. Nebraska goes even further astray by stating that the Dakotas want recreation promoted "to the exclusion of flood control, navigation, power generation or water supply" *Id.* at 21-22. The Dakotas' claim and Petition are hardly so extreme. We ask only that the Court review the ruling that the Flood Control Act mandates that the Corps prefer navigation over recreation. If the Court agrees that there is no such mandate it does not follow that the system will be operated to favor recreation over flood control, irrigation, drinking water systems, and power production. It would, however, follow that the Corps could no longer push recreation to the back of the line. Recreation would be entitled to greater consideration in the Corps' balancing efforts, but drinking water and electricity for St. Louis, Omaha, and other downstream cities would not be shut off.

MO-ARK presents a different specter. It asserts that the Dakotas seek, or that our position will lead to day-to-day judicial review of the Corps' operations. MO-ARK Brf. at 9. This is hardly a consequence of giving recreation parity. The Corps will retain discretion in managing the river.

## V. The Question Presented does not seek review of the 1979 Master Manual.

MO-ARK and Missouri argue that the 1979 Master Manual supports the court's decision to give navigation a preference. MO-ARK Brf. at 14-15; Miss. Brf. at 5, 7. On March 19, 2004, a new Master Manual is to replace the 1979 Manual. Corps Brf. at 12-13. More importantly, the Petition seeks only the Court's interpretation of the Flood Control Act, not its view of the soon to be replaced 1979 Manual. Nebraska adds that we are making an untimely challenge to the 1979 Master Manual. Neb. Brf. at 3, 24. Again, the Dakotas do not challenge the 1979 Manual, or whatever use the court below might have made of it.

## VI. The Court of Appeals made errors of law.

MO-ARK argues that the court of appeals properly found that *ETSI Pipeline Project v. Missouri,* 484 U.S. 495 (1988), ruled that navigation has priority under the Flood Control Act. MO-ARK Brf. at 13. *ETSI's* role in this dispute is discussed in the Petition. Pet. at 26-27. In sum, *ETSI* was an inter-agency dispute that did not even involve what priorities may have been set, if any, by the Flood Control Act. The court's reliance on it was misplaced. MO-ARK adds that the Dakotas improperly rely on the O'Mahoney-Milliken Amendment to further the recreation claim. MO-ARK Brf. at 15-16. The Dakotas don't rely on the Amendment.

Nebraska and MO-ARK argue that the Flood Control Act gives navigation priority. Neb. Brf. at 17-24; MO-ARK Brf. at 13-14, 16-17. While the Petition contains an adequate discussion of the Act, Pet. at 15-24, the Dakotas make one point. The Joint Report, authored by the Bureau of Reclamation and Corps of Engineers, was adopted by Congress as a part of the Flood Control Act. Pet. App. at 90. The Report, and thus the Act, states that the Missouri River Basin is to be developed to "secure the maximum benefits for flood control, irrigation, navigation, power,

domestic and sanitary purposes, wildlife, and recreation." *Id.* at 102. Recreation is as much a project purpose as is navigation. The Joint Report adopted by Congress does not award navigation a priority.

## CONCLUSION

For the foregoing reasons and those in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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